Supreme Court, U.S.
FILED
SEP 6 2000
OFFICE OF THE CLERK

No. ——

IN THE

Supreme Court of the United States

LOCAL UNION 702, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,

and

LOCAL UNION 148, INTERNATIONAL UNION OF OPERATING ENGINEERS, AFL-CIO,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

and

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.,
Suite 1000
Washington, D.C. 20005
(202) 842-2600

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

30pp

QUESTION PRESENTED

Whether there is an exception—privileging employer lockouts in reprisal for employee protected, concerted activity and with the object of forcing the employees to cease such activity—to the basic National Labor Relations Act anti-discrimination provisions making adverse employer action in reprisal for NLRA-protected employee activity an unfair labor practice?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
1. The Background Facts	2
2. The ALJ's Decision	4
3. The Board's Decision	6
4. The D.C. Circuit's Opinion	8
REASONS FOR GRANTING THE WRIT	10
1. The Decision Below Violates Basic NLRA Anti-Discrimination Principles	13
2. This Court's Bargaining Lockout Jurisprudence Does Not Authorize Lockouts in Reprisal for Protected, Concerted Activity	20
CONCLUSION	24

TABLE OF AUTHORITIES

CASES Page

Allied Industrial Workers v. NLRB, 476 F.2d 858 (D.C. Cir. 1973) 19

American Ship Building v. NLRB, 380 U.S. 300 (1965) ..... *passim*

Birch Run Welding & Fabricating v. NLRB, 761 F.2d 1175 (6th Cir. 1985) 19

Central Illinois Public Service Company, 326 N.L.R.B. No. 80 (1998) ..... *passim*

Highland Superstores, 314 N.L.R.B. 146 (1994) 15-18

Local 702, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. NLRB, 215 F.3d 11 (D.C. Cir. 2000) ..... *passim*

Majestic Molded Products, Inc. v. NLRB, 330 F.2d 603 (2d Cir. 1964) 19

Merchants Truck Line v. NLRB, 577 F.2d 1011 (5th Cir. 1978) 19

Metropolitan Edison Co. v. NLRB, 460 U.S. 693 (1983) 13-14

Molon Motor and Coil Corp. v. NLRB, 965 F.2d 523 (7th Cir. 1992) 14

Movers and Warehousemens Ass'n of D.C. v. NLRB, 550 F.2d 962 (4th Cir. 1977) 17

NLRB v. Brown Food Store, 380 U.S. 278 (1965) ..... *passim*

TABLE OF AUTHORITIES—Continued

Page

NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963) 13-14

NLRB v. Great Dane Trailers, 388 U.S. 26 (1967) 6

NLRB v. Insurance Agents, 361 U.S. 477 (1960) 11, 20

NLRB v. Transportation Management Corp., 462 U.S. 393 (1983) 14

NLRB v. Zelrich Co., 344 F.2d 1011 (5th Cir. 1965) 15

Packerland Printing Co. v. NLRB, 494 F.2d 293 (7th Cir 1974) 14

Reno Hilton Resorts v. NLRB, 196 F.3d 1275 (D.C. Cir. 1999) 14

Riverside Cement Co., 296 N.L.R.B. 840 (1989) 9, 16, 18-19

Secretary of Agriculture v. United States, 347 U.S. 645 (1954) 17

Teamsters v. NLRB, 863 F.2d 946 (D.C. Cir. 1988) 14

Thrift Drug Co., 204 N.L.R.B. 41 (1973) 9, 16-17, 19

Wright Line, 251 N.L.R.B. 1083 (1980) 5

STATUTES

28 U.S.C. § 1254(1) 1

National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 151 *et seq.*:

29 U.S.C. § 151 ..... 13, 22

TABLE OF AUTHORITIES—Continued

Page

29 U.S.C. § 157 ..... *passim*

29 U.S.C. § 158(a)(1) ..... *passim*

29 U.S.C. § 158(a)(3) ..... *passim*

SECONDARY AUTHORITIES

Note, "Lockouts—Employers Lockouts with Temporary Replacements is an Unfair Labor Practice," 85 Harv. L. Rev. 680, 686 (1972)..... 7

PETITION FOR A WRIT OF CERTIORARI

Local Union 702, International Brotherhood of Electrical Workers, AFL-CIO, and Local Union 148, International Union of Operating Engineers, AFL-CIO, pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the District of Columbia Circuit in *Local 702, International Brotherhood of Electrical Workers, AFL-CIO, et al. v. NLRB*, Nos. 99-1137/99-1139 (D.C. Cir. May 9, 2000).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 215 F.3d 11, and is reproduced in the separately bound appendix to this petition at App. 1a-14a. The opinion of the National Labor Relations Board ("the Board"), is currently reported in slip form at 326 NLRB No. 80 and in electronic form at 1998 WL 600788, and is reproduced in the appendix to this petition at App. 15a-262a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 9, 2000. On July 31, 2000, Chief Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including September 6, 2000. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7 of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 157, states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . .

Sections 8(a)(1) and 8(a)(3) of the NLRA, 29 U.S.C. §§ 158(a)(1) and (a)(3) provide in relevant part:

> It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> [or]
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . . .

STATEMENT OF THE CASE

1. The Background Facts

Petitioners—Local Union 702, International Brotherhood of Electrical Workers and Local 148, International Union of Operating Engineers (collectively "the Unions")—represent some 1,500 employees at Central Illinois Public Service Company ("CIPS" or "the Company"), a public utility that supplies electricity and natural gas in central and southern Illinois. App. 17a.[1]

In April 1992—with the extant labor agreements due to expire—CIPS and the Unions began collective bargaining negotiations looking to new agreements. App. 17a.

In March 1993—with the parties having agreed to a series of extensions of the prior contracts during negotiations but having failed to agree on mutually acceptable successor contracts—CIPS submitted its "final offer" to the Unions. App. 17a, 73a.

---

[1] Because the Court of Appeals accepted the Board's findings of fact, see App. 5a, this factual recitation draws from the findings of the Board's opinion and the findings of the Administrative Law Judge ("ALJ") opinion accepted by the Board.

On April 23, 1993, the day before the last contract extensions expired, the Unions rejected the Company's final offer. At that point, the Unions, rather than going on strike, determined to work without a contract for the duration of the negotiations and to institute a "work-to-rule" program (also referred to as an "inside-game" program). App. 17a, 76a.

Pursuant to that determination, Local 702 business agent Dan Miller immediately prepared written suggestions for work-to-rule activities and distributed those suggestions to the Union's shop stewards. App. 18a, 97a.

The next day, Charles Baughman, CIPS' Human Resources Manager, approached Miller with a copy of the suggested work-to-rule activities and stated that CIPS "was not going to put up with this shit." App. 18a.

Some three weeks later, on May 20, 1993, Baughman personally notified the Unions that the Company was instituting a lockout of all bargaining-unit employees as "a response to the work-to-rule practices and the refusals to work overtime and to provide medical information on sick leave forms." App. 19a. That same day, Clifford Greenwalt, CIPS' Chief Executive Officer, sent letters to employees represented by Local 702 which "elaborated further on the reasons for the lockout," to the same effect. *Id.*[2] CIPS also "sent substantially similar letters to employees represented by Local 148." *Id.*

---

[2] Insofar as it is relevant to this Petition, the letter stated:

> Based on the events of the last few weeks, I do not feel there is any other alternative. During this period, the Company has failed to receive what it is entitled to from employees represented by IBEW Local 702 in return for the wages and benefits which make it possible for you to provide your families with security and well-being. We have consistently encountered refusals to work overtime, excessive work-to-rule practices that have hurt productivity, and refusals to provide necessary information to supervisory personnel. These conditions are neither acceptable nor warranted. [*Id.*]

2. The ALJ's Decision

The Unions filed unfair labor practice charges with the NLRB, alleging, *inter alia*, that the lockout violated §§ 8(a)(1) and 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. §§ 158(a)(1) and (a)(3). On investigation of those charges, the NLRB General Counsel issued an NLRA §§ 8(a)(1) and 8(a)(3) complaint against CIPS. After a nine-week hearing on that complaint, the ALJ concluded that the lockout was an unfair labor practice.

The ALJ first addressed CIPS' basis for locking out its bargaining-unit employees and found that CIPS took this action simply and solely "in reprisal for the inside game actions . . . regardless of whether such actions constituted protected concerted or union activity, and in a determine[d] effort to stop those actions." App. 85a.

Next, the ALJ addressed the nature of the Union's "work-to-rule" program. The ALJ found that this program "consisted of: (1) refusals to work voluntary overtime, or overtime which was otherwise within the allowable discretion of the employee to accept or reject; (2) reasonable work-to-rule practices; and (3) presentation of grievances as a group." App. 240a. On the basis of these findings, the ALJ concluded that the employees' actions "constituted protected activity under the Act." *Id.*.[3]

---

[3] In reaching this conclusion, the ALJ found that there "was no work slowdown campaign" and no "'partial' or 'intermittent' strikes," App. 169a; that overtime was not mandatory under the contract and that "employees declined only historically voluntary overtime, and accepted historically forced overtime except in a few cases where they gave proper excuses . . . which were not questioned," App. 184a; and that there were no "excessive or unreasonable work-to-rule practices," App.170a.

It is also worthy of note that the record discloses but a single group grievance presentation by members of Local 702 during the work-to-rule program. In May 1993, a group of employees gathered at their supervisor's office to protest the suspension of two employees for failing

Having concluded that the Unions' work-to-rule activities were NLRA §7-protected, concerted activities, and that CIPS instituted the lockout as a "reprisal" for those activities, the ALJ then applied the test articulated by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 869 (1st Cir. 1981), which applies in "all cases alleging violations of Section 8(a)(3) or violations of Section 8(a)(1) turning on employer motivation." *Id.* at 1083. Under that test, the General Counsel must "make a *prima facie* showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct." *Id.*

Applying the *Wright Line* test to his findings, the ALJ first concluded that CIPS "locked out the bargaining unit[] employees as an act of discrimination, in order to harm or punish them for engaging in concerted activities." App. 242a. Next, the ALJ—noting that this Court has authorized post-impasse employer lockouts "for the *sole purpose* of bringing economic pressure to bear in support of [an employer's] legitimate bargaining position," *American Ship Building v. NLRB*, 380 U.S. 300, 318 (1965) (emphasis added)—found that CIPS failed to meet its *Wright Line* burden to justify its decision as turning on non-discriminatory criteria. App. 243a-244a. Consequently, the ALJ found that the lockout was "an act of reprisal to punish the employees for engaging in protected concerted activities and to discourage the employees from engaging in such activities," and concluded

---

to provide certain information on their sick-leave forms—information that the Union believed to be confidential. The dispute was settled informally when CIPS agreed to allow employees to omit the information from their forms. App. 18a.

that the lockout violated NLRA §§ 8(a)(1) and 8(a)(3). App. 244a.[4] CIPS appealed to the Board.

3. The Board's Decision

In a two-to-one decision, the Board reversed the ALJ's determination that CIPS' lockout was an unfair labor practice.

The Board first rejected the ALJ's legal conclusion that the lockout here—instituted in reprisal for the bargaining unit employees' NLRA § 7-protected, concerted activities and with the intention of harming and punishing the employees for engaging in these activities—constituted §§ 8(a)(1) and 8(a)(3) discrimination. In so doing, the Board accepted both the ALJ's credibility determinations and the ALJ's finding that the lockout was in reprisal for the Unions' work-to-rule program and the bargaining-unit employees' participation therein. The Board also proceeded on the premise that the work-to-rule program was § 7-protected, concerted activity. App. 21a. Nonetheless, the majority concluded that even if "the *sole objective* of the lockout was to force the Unions to cease" their protected, concerted activities, this motivation "was "not an impermissible business objective." App. 25a (emphasis added).

Citing this Court's general observation in *American Ship Building Co. v. NLRB*, 380 U.S. 300, 309 (1965), that the "right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage," the Board reasoned that because the Unions' protected, concerted activities were instituted in support of the Unions'

---

[4] Having found that CIPS' motivation for the lockout was impermissible according to the *Wright Line* analysis, the ALJ stated that there was no need to assess whether the lockout was unlawful under the "inherently destructive" test set forth in *NLRB v. Great Dane Trailers*, 388 U.S. 26 (1967), though the ALJ did opine that the lockout would be unlawful under that test as well.

bargaining position, CIPS was privileged to lock out all bargaining-unit employees. App. 25a. "Simply put," the Board summed up, "an employer is and 'should be free to exert any force that has as its only effect compelling the union to yield in a current dispute,' and if forcing the Unions to end their inside game in support of their bargaining position was the [employer's] only purpose, it constituted a legitimate and substantial business justification for the lockout." App. 26a (quoting Note, "Lockouts—Employers' Lockouts with Temporary Replacements is an Unfair Labor Practice," 85 Harv. L. Rev. 680, 686 (1972)).

In addition, as a second ground for reversing the ALJ's decision, the Board rejected the ALJ's finding that the *only* objective of the lockout was to force the employees to cease their protected, concerted activities. Rather, the Board concluded on the basis of the May 20, 1993 letters that the lockout was intended not only to force the Unions to end their concerted activities, but also to support CIPS' bargaining position. App. 28a.

The dissenting opinion took issue with the Board's primary legal holding—*viz.*, "that an employer may lawfully lock out employees to pressure them to abandon" concerted, protected activity, App. 43a—as contrary to basic principles of NLRA anti-discrimination law. "While the parties generally have their choice of economic weapons," the dissent explained, "this choice is not unrestricted":

> The pressure exerted may not be directed toward inhibiting the exercise of section 7 rights, and a lockout prompted by an antiunion motive is plainly illegal. Simply because the Respondent used an economic weapon to counterattack an economic weapon used by the Unions in support of their bargaining demands, does not mean, as our colleagues hold today, that the Respondent's use of that weapon was legitimate. [App. 56a.]

The dissent went on to note that while the Board and the courts have construed the NLRA as permitting bargaining lockouts in certain clearly delineated circumstances, no prior decision has "endorsed the proposition endorsed by . . . the majority, that the goal of forcing employees to cease engaging in protected activities in support of a union is a legitimate and substantial business objective." App. 57a.

Finally, the dissent described the impact of the Board's holding in the following terms:

> [T]he majority would allow an employer to respond to any protected activities in support of a union's bargaining position by locking out its employees, whether or not the employer had a specific legitimate business justification, simply because there was an ongoing bargaining dispute. Thus, for example, if employees held regular rallies outside the plant on their spare time, in support of the Union's bargaining demands, and if the majority means what it says, the employer would be permitted to lock out the employees to pressure them to halt the rallies. I can therefore envision that the lockout, which will (given the universality of no strike/no lockout pledges) generally occur during negotiations, might too easily become a device disguised as an effort to protect the employer's bargaining position, for breaking a union. [App. 62a n.24.]

4. The D.C. Circuit's Opinion

On the Unions' timely petitions for review, the D.C. Circuit affirmed the Board's decision.

At the outset, the Court of Appeals addressed "[t]he first objective the Board attributed to CIPS," which, that court agreed, was "'to force the Unions to cease their inside game activities,'" App.8a (quoting 326 NLRB No. 80, slip op. at 4 (App. 25a). The court below upheld the Board's legal conclusion that this is a lawful objective on the ground that the lockout "was a legitimate defense against" the work-to-rule

activities that the Unions "deployed as part of 'economic warfare in the midst of bargaining negotiations with the hope of securing agreement on their terms for new contracts.'" App. 8a (quoting 326 NLRB No. 80, slip op. at 4 (App. 25a)).

The Court of Appeals, moreover, agreed with the Board majority that the protected status of the Union activity here "does not insulate it from counteraction by an employer." App. 11a. In this regard, the court below read *American Ship Building Co. v. NLRB*, *supra*, and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965), as sanctioning lockouts in response to protected strike activity and opined that there is "no reason to treat differently the lockout here which was implemented in response to the inside game strategy that the Unions adopted as an alternative to a strike," App. 11a.[5] In so doing, the D.C. Circuit approved a newly-crafted "economic defense justification," *id.*, for employer lockouts.[6]

---

[5] In reaching this conclusion, the court below rejected the Unions' argument that the Board's decision here is inconsistent with two prior Board decisions—*Riverside Cement Co.*, 296 N.L.R.B. 840 (1989), and *Thrift Drug Co.*, 204 N.L.R.B. 41 (1973)—holding that employer lockouts of employees because they engaged in protected, concerted activities violate NLRA §§ 8(a)(1) and 8(a)(3). The court below treated these cases as inapposite because CIPS locked out *all* of the bargaining-unit employees, not just the specific employees who engaged in the protected activity, as in *Riverside* and *Thrift Drug*. App. 11a-12a. Thus, on the narrowest reading of the opinion, the Court of Appeals approved adverse employment action intended to interfere with protected activities as long as the adverse action indiscriminately reaches all bargaining-unit employees rather than targeting only those who engaged in the protected activity.

[6] We note, for the sake of completeness, that the Court of Appeals went on to affirm the Board with respect to CIPS' "second business objective"—that is, the Board's finding that the lockout was also intended to support the employer's bargaining position—concluding that this objective "was a legitimate one and supported by the evidence." App. 9a.

While we disagree that the Board's finding of this second "motive" or "objective" has any evidentiary support, we do not challenge the Board's ruling in this regard or the Court of Appeals' affirmance thereof. First of

REASONS FOR GRANTING THE WRIT

In this case, a divided National Labor Relations Board, affirmed by the D.C. Circuit, essayed a radical break in the National Labor Relations Act law by legitimizing lockouts in reprisal for NLRA § 7-protected, concerted activity.

By so doing, the decision below works a qualitative expansion in the NLRA lockout privilege as delineated in *American Ship Building Co. v. NLRB*, 380 U.S. 300 (1965), and *NLRB v. Brown Food Store*, 380 U.S. 278 (1965)—this Court's seminal bargaining lockout decisions—and a corresponding radical diminution in the most basic, and well-settled, NLRA anti-discrimination principles.

Given the force of the employer lockout and the importance of the NLRA's legal protections for § 7 activity in realizing the Act's aims, this is a change in the law of the most profound consequence.

Not surprisingly, then, the decision below is contrary to the long line of Board and court authority holding that employer reprisals against employee NLRA § 7-protected, concerted

---

all, of course, this Court does not sit to resolve evidentiary disputes. Second, putting aside that evidentiary question, the conclusion that a true employer bargaining lockout is lawful is consistent with this Court's *American Ship* and *Brown Food* decisions and does not present an independent basis for this Court's review. And, third, the Board's holding in this regard and the Court of Appeals' affirmance thereof is of no legal relevance to the question raised by the Board's primary holding. Under well-settled principles of NLRA § 8(a)(3) anti-discrimination law, an adverse employer action motivated by an unlawful objective is not rendered lawful by the concomitant presence of a lawful objective. Thus, if we are correct that, contrary to the Board's first holding, a retaliatory lockout to harm and punish employees for engaging in protected, concerted activity is NLRA § 8(a)(3) discrimination, the lockout here, which the ALJ, the Board, and the Court of Appeals all found was so motivated was unlawful. This is so even crediting the Board's second finding that the lockout was also animated by a second legitimate motive.

activity are a § 8(a)(3) unfair labor practice. And, the talismanic use of the terms "lockout" and "economic weapon" to describe the employer reprisal sanctioned here does nothing to distinguish those § 8(a)(3) decisions or to justify the different result reached in this case. Equally contrary to the decision below, nothing in this Court's bargaining-lockout decisions provides any basis—or any support—for the ruling here. To the extent that the Board and the Court of Appeals did not proceed in resolute disregard of the NLRA anti-discrimination principles, both proceeded on a plain misreading of this Court's lockout decisions.

The reprisal-lockout question of first impression presented here, like its bargaining-lockout predecessors in this Court, is a particularly complex question that goes to the Act's very essence.

The employer lockout occupies a point at which two NLRA regimes meet, and the legal status of a lockout turns on a proper understanding of both regimes and the role each plays in the national labor policy as a whole. The Act, first of all, grants employees the right to engage in concerted union activity and protects that right by prohibiting retaliatory adverse employer actions; and, of equal moment, the Act establishes a system of free collective bargaining "that look[s] to the ordering of the parties' industrial relationship through the formation of a contract," a process that recognizes "the availability of economic pressure devices to each to make the other party incline to agree on one's terms," *NLRB v. Insurance Agents*, 361 U.S. 477, 485, 489 (1960).

As *American Ship* and *Brown Food* show, granting the NLRA §§ 7 and 8(a) employee-protection regime an overly broad reach undermines the free-collective-bargaining regime. As this case shows, it is equally true that granting the free-collective-bargaining regime an overly broad reach undermines the §§ 7 and 8(a) employee-protection regime. And, as *American Ship* and *Brown Food* also show, the

complexities involved in placing the lockout in its proper place in these regimes have proved sufficiently daunting as to require this Court's intervention to maintain the integrity of the statutory scheme.

Thus, in *American Ship* and *Brown Food*, while the Board had given primacy to the §§ 7, 8(a) employee-protection regime by invalidating the bargaining lockout, this Court recognized the primacy in that context of the NLRA free-collective-bargaining regime and on that basis, the legitimacy of the bargaining lockout as an employer economic weapon for securing a collective bargaining agreement on economic terms favorable to the employer.

Here again the Board has gotten things wrong, this time with regard to employee lockouts in reprisal against employee § 7-protected concerted activity. What is more, the Board, and the Court of Appeals in affirming the Board, have gotten things wrong by misreading this Court's *American Ship* and *Brown Food* decisions to go beyond validating bargaining lockouts and to validate both lockouts "responsive" to protected strike activities and lockouts "in reprisal for" other protected *non-strike* activities.

But such a general lockout privilege exception to the NLRA §§ 8(a)(1) and (3) prohibition on employer reprisals against § 7-protected, concerted activity has no base in *American Ship* or *Brown Food* or in the free-collective-bargaining regime and cannot be justified by reference to that regime, its policy, or its purposes. And, the Board's sanctioning of reprisal lockouts is directly contrary to the foundational NLRA principle that adverse employer action against employees for engaging in § 7-protected concerted activity is a *core* employer unfair labor practice. That principle is foundational in the sense that § 7 *rights* and the Act's protection of those *rights* form the predicate for, and set

the limit on, the free-collective-bargaining regime. *See* 29 U.S.C. §§ 151, 157.

The decision below, by overriding that limit, distorts both the Act's protection of employee § 7 rights and the Act's preference for free collective bargaining as a means of mediating conflicting employer and employee *economic interests*, which presupposes those rights and their protection.

By reason of the Act's enforcement scheme, unless *certiorari* is granted here the Board's first words privileging employer reprisal lockouts will be the authoritative last words heard, beyond challenge in any forum, on the legality of such lockouts. That being so—and given the nature and magnitude of the Board's error, its destructive impact on NLRA § 7 rights and on the exercise of those rights and its equally destructive impact on the structure of the NLRA legislative scheme—this reprisal-lockout case, like its predecessor bargaining-lockout cases, urgently calls for this Court's review.

1. The Decision Below Violates Basic NLRA Anti-Discrimination Principles

A. "The central purpose" of the anti-discrimination regime established by NLRA §§ 7, 8(a)(1), and 8(a)(3) is "to protect employee self-organization and the process of collective bargaining from disruptive interference by employers." *American Ship*, 380 U.S. at 317.

It is well-settled that retaliation against employees for their exercise of § 7 rights is an unlawful motive that lies at the very core of the NLRA anti-discrimination law. As this Court has stressed, the Act "makes unlawful discrimination against employees who participate in concerted activities protected by § 7 of the Act." *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 703 (1983); *see also NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963) ("Under § 8 (a) (3), it is unlawful for an employer by discrimination in terms of employment to

discourage 'membership in any labor organization,' which includes discouraging participation in concerted activities").

And, it is equally well settled that adverse employer action based on an improper motive—*viz.*, to retaliate against employees for protected, concerted activity—is a § 8(a)(3) unfair labor practice even though the same employer action for a proper motive is entirely lawful. "Where there is direct evidence of an employer's antiunion motive, the Court has recognized that otherwise legitimate actions may constitute unfair labor practices." *Metropolitan Edison*, 460 U.S. at 701, citing *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 227 (1963).[7]

All this being so, a long and unbroken line of Board and court precedents firmly establish that an employer commits an unfair labor practice by retaliating against employees—through a wide variety of adverse employer actions—for engaging in § 7-protected union activities. *See, e.g., Reno Hilton Resorts v. NLRB*, 196 F.3d 1275, 1283 (D.C. Cir. 1999)(employer who contracted out security work in reprisal for strike by security workers violated §§ 8(a)(1) and 8(a)(3)); *Molon Motor and Coil Corp. v. NLRB*, 965 F.2d 523, 526 (7th Cir. 1992) (discharge of employee for engaging in protected work stoppage is an unfair labor practice); *Teamsters v. NLRB*, 863 F.2d 946, 955 (D.C. Cir. 1988) ("[A]n employer violates section 8(a)(3) of the Act when, in retaliation for employees' union activities, it lays off or discharges employees."); *Packerland Printing Co. v. NLRB*, 494 F.2d 293 (7th Cir 1974) (per curiam) (transferring of employees for engaging in protected activities unlawful);

---

[7] To be sure, as a defense, an employer may offer a lawful reason for the adverse action, but once an unlawful motivation has been shown, the employer then has the burden of proving that it would have taken the same adverse action even in the absence of the prohibited motivation. *See NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403-04 (1983).

NLRB v. Zelrich Co., 344 F.2d 1011, 1014 (5th Cir. 1965) (withholding of Christmas bonuses from all employees in retaliation for the employees' majority vote for union representation is an unfair labor practice).

The adverse employer action here—a bargaining-unit-wide lockout—is a particularly pointed reprisal against protected, concerted activities. Its very point, as the Board and the court below recognized, was to coerce the employees to agree to cease engaging in the very § 7 activities the Act is designed to protect. Thus, as a matter of reason, the lockout is the last form of retaliatory adverse employer action that the Act would be expected to countenance. And, indeed, the Board has—until now—consistently held that employer lockouts in reprisal for employees' concerted, protected activities does violate §§ 8(a)(1) and 8(a)(3).

In *Highland Superstores*, 314 N.L.R.B. 146 (1994), for example, the Board concluded that an employer engaged in NLRA-prohibited discrimination by responding to protected, concerted employee action during bargaining—namely, handbilling in support of a consumer boycott—by locking out its employees "to punish the employees for their handbilling." Significantly, the Board reached this conclusion while acknowledging that the employees' protected activity constituted employee "economic action":

> In our view, an employer can ordinarily take economic action in response to economic action by the union, provided that the employer's action is in support of a lawful bargaining position. In the instant case, the Respondent locked out its employees . . . in response to the economic action of the Union (handbilling in support of a consumer boycott). However, we are persuaded that the Respondent acted to punish the employees for their handbilling, rather than in support of its bargaining position. [*Id.* at 146.]

Similarly, in *Riverside Cement Co.*, 296 N.L.R.B. 840, 842 (1989), the Board held that an employer engaged in prohibited discrimination when it locked out employees "in retaliation for the protected concerted activity engaged in by the employees."[8]

And, in *Thrift Drug Co.*, 204 N.L.R.B. 41 (1973), *enforced*, 491 F.2d 751 (3d Cir. 1974), the Board held that the employer violated the Act by laying off an employee for picketing in support of the union's bargaining position and conditioning the employee's return on a cessation of this picketing. The layoff was unlawful, the Board held, because its "primary object was the protection of the employer against the Union's economic weapons rather than the placing of an economic burden on the union members in support of the employer's contract position" even though the lockout was "secondarily supportive of the Employer's economic contractual position." *Id.* at 43.

As *Highland Superstores*, *Riverside Cement*, and *Thrift Drug* make clear, prior to its decision below, the Board had consistently understood the NLRA anti-discrimination law to prohibit employer lockouts instituted in reprisal for employees' engaging in § 7-protected, concerted activities.

B. Applying these basic NLRA anti-discrimination principles to this case, it is clear that CIPS' motivation for the

---

[8] In that case, after the contract had expired and the negotiations had reached an impasse, the employer implemented its final offer, which included the continuation of a contract provision requiring employees to provide some "personal tools" but specifically exempting others. The employees then engaged in a concerted refusal to provide the contractually exempted tools, and the employer responded by instituting a lockout. The Board concluded that the supplying of these tools was voluntary, and that the refusal to supply these tools voluntarily was protected, concerted activity. Consequently, the Board held, the lockout violated §§ 8(a)(1) and 8(a)(3) because it was instituted "in response to the employees' decision through the Union to invoke the terms of the implemented proposal." 296 N.L.R.B. at 842.

lockout—to "harm or punish" the employees for engaging in concerted activities, App. 242a—is an NLRA §§ 8(a)(1) and 8(a)(3) unfair labor practice. Indeed, this is a case in which the credited, direct evidence establishes that the employer was motivated by a desire to retaliate for the employees' protected, concerted activities.[9]

Thus, the decision of the Board and the court below not only flies in the face of the most basic NLRA anti-discrimination principles, but it also reverses the course the Board charted in *Thrift Drug* and followed for nearly two decades with respect to the lockout in retaliation for § 7-protected, concerted activity, the precise employer action at issue here.

Notwithstanding this stark departure from settled anti-discrimination principles in general and the Board's consistent application of those principles in lockout cases in particular, neither the Board nor the court below acknowledged this sea change in the Board's reading of §§ 8(a)(1) and 8(a)(3), much less "adequately explained its departure from prior norms." *Secretary of Agriculture v. United States*, 347 U.S. 645, 653 (1954). Rather, the Board declared, by way of an extended footnote, that its prior reprisal-lockout precedents were "distinguishable," App. 33a n.20, and the Court of Appeals either accepted the Board's

---

[9] Although the Board found that CIPS had an additional, proper motivation, there was no showing—and no finding—that CIPS would have instituted the lockout in the absence of the protected activity engaged in here. The Board's second holding, therefore, cannot salvage its decision that CIPS' retaliatory adverse action against its employees for exercising their § 7 rights was lawful. "Even if the lockout is motivated in part by the wish to exert economic pressure for the lawful purpose of supporting a legitimate bargaining position, the lockout is nevertheless unlawful if it is also motivated by an intent to interfere with" protected, concerted activity. *Movers and Warehousemen's Ass'n of D.C. v. NLRB*, 550 F.2d 962, 966 (4th Cir. 1977).

"distinctions" or offered "distinctions" of its own, see App. 12a. To say that these distinctions are a micron thin is perhaps generous in the extreme.

First, the Board distinguished its recent, and fully on-point, decision in *Highland Superstores* on the ground that the employer there not only locked out the employees to retaliate against their protected handbilling, but had also threatened to discharge the employees before so doing. App. 33a n.20.[10] That is not a distinction so much as a tacit acknowledgement that there is no distinction. For there is no legal rule that an employer who takes adverse employment action for an impermissible motive escapes § 8(a)(3) liability by not committing the prior independent § 8(a)(1) violation of threatening its employees with discrimination. At all events, the Board's decision in *Highland Superstores* that the employer violated § 8(a)(3) rested not on the earlier threat *per se*, but on the record evidence as a whole (including the pre-lockout threat) demonstrating that the employer locked out the employees "to punish the employees for their handbilling." 314 N.L.R.B. at 146. That much is clear in this case from the undisputed contemporaneous evidence concerning the lockout, its purpose, and its motivation.

In addition, the Board pushed *Riverside Cement* to the side by declaring that a violation was found in that case because the employer's implementation of a rule requiring employees to furnish their own tools constituted a unilateral change in change in their employees' terms of employment, which rendered the employer's bargaining position illegitimate.

---

[10] In that case, the Board found the threat to be an independent § 8(a)(1) violation. With respect to the § 8(a)(3) violation, the Board also cited the pre-lockout threat as evidence of the employer's improper motivation. *See id.*; *see also* App. 59a n.20 (Member Liebman, dissenting). Nowhere in its decision does the Board remotely suggest that the pre-lockout threat was the *sine qua non* for its finding of unlawful discrimination.

App. 33a n.20. But, as Member Liebman's dissenting opinion pointed out, the *Riverside Cement* decision was not based on this ground—indeed nothing in this regard is to be found in that decision at all. *See Riverside Cement*, 296 N.L.R.B. 840-42; App. 59a n.20. Rather, as noted above, the Board in *Riverside Cement* concluded that the lockout violated §§ 8(a)(1) and 8(a)(3) because, by instituting the lockout, "the [employer] engaged in retaliation for the protected concerted activities engaged in by the employees." 296 N.L.R.B. at 842.

And finally, for its part, the Court of Appeals added its own distinctions of *Riverside Cement* as well as *Thrift Drug*. According to the Court of Appeals, those cases are inapposite because "[i]n contrast to *Riverside* and *Thrift Drug*, the lockout here was directed unit-wide, not to specific employees engaged in specific acts." App. 12a. This explains nothing and justifies nothing. It is well settled, both within and without the D.C. Circuit, that an employer does not escape liability for retaliatory action by punishing all employees uniformly for the § 7 concerted activity of some of their number. As the Second Circuit put the matter, "A power display in the form of a mass lay-off, where it is demonstrated that a significant motive and desired effect were to 'discourage membership in any labor organization,' satisfies the requirements of § 8(a)(3) to the letter even if some white sheep suffer along with the black." *Majestic Molded Products, Inc. v. NLRB*, 330 F.2d 603, 606 (2d Cir. 1964).[11]

---

[11] *See also, e.g., Allied Industrial Workers v. NLRB*, 476 F.2d 858, 877 (D.C. Cir. 1973) ("A practice applied uniformly to all employees may be discriminatory and violate the Act . . . ."); *Birch Run Welding & Fabricating v. NLRB*, 761 F.2d 1175 (6th Cir. 1985) ("[G]eneral retaliation by an employer against the workforce can discourage the exercise of section 7 rights just as effectively as adverse action taken against only known union supporters."); *Merchants Truck Line v. NLRB*, 577 F.2d 1011, 1016 (5th Cir. 1978) ("Where the central aim of a mass

2. This Court's Bargaining Lockout Jurisprudence Does Not Authorize Lockouts in Reprisal for Protected, Concerted Activity

The Board and the Court of Appeals dispatched the NLRA § 7 rights at stake here and their §§ 8(a)(1) and (3) safeguards with what both treated as a deft but telling doctrinal *coup de grâce*: that this Court's *bargaining lockout* decisions create a general lockout exception to the otherwise-applicable NLRA anti-discrimination principles. In the final analysis, the decision below rests on reading this Court's *American Ship* and *Brown Food* decisions to sanction the lockout as a response to protected *strike* activity and, by an extension of their rationale, as further authorizing the lockout as "a legitimate defens[ive]" response to other protected, concerted *non-strike* activities. App. 8a.

That is to seriously misread *American Ship* and *Brown Food*. Those decisions recognize a carefully defined employer privilege to lock out employees for the purpose of supporting the employer's bargaining position. That privilege finds its source in the NLRA free-collective-bargaining regime, which presupposes "the availability of economic pressure devices to each to make the other party incline to agree on one's terms." *Insurance Agents*, 361 U.S. at 489. Nothing in *American Ship* and *Brown Food* or in their rationale sanction an employer lockout in retaliation for protected, concerted activities and with the intention of forcing the employees to cease those activities.

A. In *American Ship*, the Board determined that even in the absence of any evidence of improper motive, a bargaining lockout is an unfair labor practice. This Court reversed, holding "an employer violates neither § 8(a)(1) nor § 8(a)(3) when, after an impasse has been reached, he temporarily shuts down his plant and lays off his employees *for the sole*

---

lay-off is to discourage union activity, the discharge is unlawful, even though neutral or anti-union employees suffer in the process.").

purpose of bringing pressure to bear in support of his bargaining position" 380 U.S. at 318 (emphasis added). In so doing, the Court was at pains to note, "[w]hat we are here concerned with is the use of a temporary layoff of employees *solely* as a means to bring economic pressure to bear in support of the employer's bargaining position, after an impasse has been reached," and to add, "[t]his is the only issue before us, and all that we decide." *Id.* at 308 (emphasis added).

American Ship thus did not concern—as this case surely does—a lockout that is motivated by a desire to retaliate for protected, concerted activity and that has as its object forcing the employees to end that activity. Rather, the *American Ship* Court stressed that "[t]here was no evidence and no finding that the employer was hostile to its employees' banding together for collective bargaining or that the lockout was designed to discipline them for doing so." 380 U.S. at 308-09.

Against all this, the Board and the court below both quoted in isolation *American Ship*'s statement that "the right to bargain collectively does not entail any 'right' to insist on one's position free from economic disadvantage," and insisted that this general statement was dispositive of the issue. App. 11a, 25a. In context, this statement does not support the decisions below at all. The *American Ship* passage in question addresses the Board's argument there that a lockout, in and of itself and without evidence of improper motive, is an unfair labor practice, and reads as follows:

> The lockout may well dissuade employees from adhering to the position which they initially adopted in the bargaining, but the right to bargain collectively does not entail any "right" to insist on one's position free from economic disadvantage. *Proper analysis of the problem demands that the simple intention to support the employer's bargaining position as to compensation and*

> *the like be distinguished from a hostility to the process of collective bargaining which could suffice to render a lockout unlawful.* [*Id.* at 308-09 (emphasis added).]

To continue with that thought, a lockout in reprisal for employees' protected, concerted activities is the paradigm of an "unlawful" lockout motivated by "hostility to the process of collective bargaining," which process, of course, contemplates as an integral feature the exercise of the rights to concerted activity vouchsafed by § 7. *See* 29 U.S.C. §§ 151, 157.

B. The decision below is no more justified by this Court's decision in *Brown Food*, the companion case to *American Ship*. *Brown Food*, unlike *American Ship*, did arise in the context of a strike, and added to *American Ship* by holding that, where employees engaged in a "whipsaw strike" against various members of a multiemployer bargaining unit, a non-struck employer does not violate NLRA §§ 8(a)(1) and 8(a)(3) by locking out its employees and hiring temporary replacements "simply . . . to bring pressure to bear in support of his bargaining position after impasse in bargaining negotiations has been reached." 380 U.S. at 284.[12]

At the same time, the *Brown Food* decision was fully as emphatic as the *American Ship* decision in disclaiming any limitation upon the recognized understanding of the NLRA anti-discrimination principle. The *Brown Food* Court took pains to stress that there was no "independent evidence that the [employer] acted either out of hostility toward the Local

---

[12] We note in passing that the court below incorrectly asserted that *American Ship* involved a strike. *See* App. 11a ("The strikes in both *American Ship Bldg.* and *Brown*, as the Board noted, were also protected activities—yet the employers' responsive lockouts in those cases were upheld by the Supreme Court."). In fact, there was no strike in *American Ship*—indeed, the gist of the union's complaint there was that the lockout burdened its right to strike by leaving the employees "nothing to strike against." 380 U.S. at 310.

or in reprisal for the whipsaw strike." *Id.* at 282 (emphasis added). Rather, the Board (as it had also done in *American Ship*) had determined that antiunion animus could be inferred from the employer action itself, without any need for a specific finding of improper motivation such as an act "in reprisal for" protected, concerted activity. *Id.* at 282. And, in correcting the Board on this point, this Court, far from diluting the anti-discrimination principle, reaffirmed the basic point that employer actions that are legitimate in the absence of a prohibited motive are illegitimate when instituted with an improper motive: The *Brown Food* Court underscored the point that "Congress clearly intended the employer's purpose in discriminating to be controlling" and that "antiunion motivation will convert an otherwise ordinary business act into an unfair labor practice." *Id.* at 287, 288.

Here, the Court of Appeals, following the Board's lead, misread *Brown Food* as having authorized the lockout on the ground that the lockout was "responsive" to the whipsaw strike; and, from this premise concluded that there was "no reason to treat differently the lockout here," which that court recognized "was implemented 'in reprisal' for the inside game." App. 11a-12a. The Court of Appeals' premise could not be more wrong and the conclusion that court drew falls with its premise. The *Brown Food* Court did *not* sanction lockouts "responsive" to whipsaw strikes. To the contrary, the Court expressly distinguished a lawful bargaining lockout from a lockout "*in reprisal for the whipsaw strike*," 380 U.S. at 282 (emphasis added).

C. Contrary to the Board's and the Court of Appeals' joint supposition then, *American Ship* and *Brown Foods*, read singly and read together, do *not* stand for the proposition that employers are privileged to lock out employees in reprisal for NLRA § 7-protected, concerted activity and in order to force the employees to cease that protected, concerted activity. To the contrary, *American Ship* and *Brown Food*—while

recognizing that the NLRA's free-collective-bargaining regime contemplates that employers, no less than employees, may use economic pressure in support for their bargaining positions—reaffirm the core protection against purposeful antiunion discrimination that §§ 8(a)(1) and 8(a)(3) prohibit. Neither *American Ship* nor *Brown Food* created any broad general lockout exception to the basic NLRA §§ 8(a)(1) and 8(a)(3) anti-discrimination principles.

The decision below thus "rest[s] on an 'erroneous legal foundation'" that only this Court can correct, and so long as that decision stands it "frustrates the congressional policy underlying [the NLRA]." *Brown Food*, 380 U.S. at 291-92.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

MARILYN TEITELBAUM
STACEY MEYERS
SCHUCHAT, COOK & WERNER
1221 Locust Street, Second Floor
St. Louis, MO 63103

CARY HAMMOND
GREG CAMPBELL
DIEKEMPER, HAMMOND, SHINNERS, TURCOTTE & LARREW, P.C.
7730 Carondele, Suite 222
Clayton, MO 63105

LAURENCE GOLD
(Counsel of Record)
PHILIP HOSTAK
BREDHOFF & KAISER, P.L.L.C.
805 15th Street N.W.,
Suite 1000
Washington, D.C. 20005
(202) 842-2600